(14) (13)

Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

GROUP W CABLE, INC., *et al.*,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

On Appeals From The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR APPELLEE FLORIDA POWER CORPORATION

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QUESTIONS PRESENTED

1. Whether a Federal Communications Commission order issued pursuant to the Pole Attachments Act, 47 U.S.C. § 224, authorizing cable television companies to occupy space on Florida Power Corporation's poles at a rate less than one-third the rate specified in existing contracts between the parties, effected a taking of Florida Power's property.

2. Whether the Pole Attachments Act is unconstitutional insofar as it authorizes takings of property and fails to provide for the determination of just compensation required by the fifth amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association, Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.

Florida Power Corporation is a wholly-owned subsidiary of Florida Progress Corporation and is affiliated with the following: Electric Fuels Corp., Talquin Corporation, Hunnicutt Equities, Progress Equities, Inc., and Progress Financial Services, Inc. This listing is included pursuant to Sup. Ct. R. 28.1.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a)[1] is reported at 772 F.2d 1537. The memorandum opinions

[1] "J.S. App." refers to the appendix to the jurisdictional statement

and orders of the Federal Communications Commission and its Common Carrier Bureau (J.S. App. 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985 (J.S. App. 48a-49a), and rehearing was denied on November 12, 1985 (J.S. App. 50a-51a). A notice of appeal was filed on December 10, 1985 (J.S. App. 52a-53a). On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986. The Jurisdictional Statements were filed on that date. Probable jurisdiction was noted and the cases were consolidated on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The fifth amendment to the Constitution provides in pertinent part "nor shall private property be taken for public use, without just compensation."

2. The text of the Pole Attachments Act, 47 U.S.C. § 224, is set forth at J.S. App. 54a-56a.

STATEMENT

1. Since the advent of cable television in the 1950's, many cable television companies have formed their distribution systems by attaching equipment to pre-existing pole systems owned by telephone companies or electric power

filed by the Federal Communications Commission and the United States of America.

companies.[2] Attachment of cable equipment involves physical installation of cables and amplifiers, attached by screws or nails and by bolts that penetrate the individual poles on which the equipment is mounted. In the past, cable companies have attached their equipment to poles pursuant to contracts negotiated with the pole owners. Those contracts specify an annual space rental rate, as well as reimbursement to the utility for costs associated with preparing the pole for attachment of the cable equipment.

In 1963 appellant Cox Cablevision Corp., d/b/a Highlands Cable TV ("Cox"), entered into a contract with appellee Florida Power Corporation ("Florida Power") under which Florida Power agreed to allow Cox to attach its equipment to Florida Power's poles at an annual rental rate of $5.50 per pole.[3] In 1977 and 1980, respectively, Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter"), the predecessors in interest to appellant Group W Cable, and appellant Acton CATV, Inc., d/b/a Brookville Properties Venture and PASCO Associates Venture ("Acton"), entered into similar contracts with Florida Power. Teleprompter agreed to pay annual rental rates ranging from $5.50 to $6.79 per pole, while Acton agreed to pay an annual rental rate of $7.15 per pole.[4]

[2] Attachments to utility poles do not represent the only method for distributing cable television signals. For example, cable facilities may be placed underground. See *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034, 2036 (1986). However, cable companies generally consider pole attachments to be the most economical approach.

[3] The Cox contract provided for a term of at least one year and was thereafter to be terminable at will by either party on six months' notice. Joint Appendix (hereafter "J.A.") 223. The rate of $5.50 per pole continued in effect until 1978, when Florida Power proposed a rate of $6.86. Upon the failure of the parties to reach agreement on a new rate, Florida Power invoked a contractual provision authorizing a higher rate under such circumstances. However, Cox continued to pay at the rate of $5.50. J.S. App. 7a.

[4] The contract between Teleprompter and Florida Power specified an

For many years cable operators sought federal intervention in private contractual pole attachment arrangements. In 1978 Congress passed the Pole Attachments Act, 47 U.S.C. § 224 (the "Act"). In the Act, Congress authorized the Federal Communications Commission ("FCC" or "Commission") to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Congress defined a "just and reasonable" rate as one that "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole." 47 U.S.C. § 224(d)(1). Congress instructed the Commission to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions [for pole attachments]." 47 U.S.C. § 224(b)(1). To aid in implementing this scheme, Congress granted the Commission the power to issue cease and desist orders. 47 U.S.C. § 224(b)(1). The Commission has jurisdiction unless a state regulates rates, terms and conditions for pole attachments and provides the Commission with a certification to that effect. 47 U.S.C. § 224(c).

The Commission's rules promulgated pursuant to the Act provide, *inter alia*, that cable companies may be charged no more than one-thirteenth of the proven costs

annual rate of $5.50 per pole for the year 1977, with annual increases that brought the rate level to $6.24 for the year 1980, $6.51 for the year 1981, and $6.79 for the year 1982. The Teleprompter contract was entered into on July 1, 1977, and extended for a period of five-and-one-half years. J.A. 18, 30-31. The Acton contracts extended for a period of one year. *Id.* at 117, 146-47. These contracts continued in effect after the initial period and provided for termination by either party on six months' notice. *Id.* at 31, 117, 146-47.

of owning and maintaining the utility poles to which their equipment is attached. *Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59, 69-71 (1979). The Commission has concluded that Congress intended the Act to be interpreted in such a way as to promote the economic growth of the cable industry. *Id.* at 74.

2. In November 1980, appellant Teleprompter filed a complaint against Florida Power with the Common Carrier Bureau of the Commission. Citing the Pole Attachments Act, Teleprompter sought to be relieved of the annual rental rates to which it had agreed in 1977. Teleprompter requested that in place of the annual rates of over $6.00 per pole specified in its existing contract with Florida Power the Commission order that a maximum rate of $2.23 per pole be inserted into the contract. In April 1981, Acton filed a similar complaint with the Common Carrier Bureau, seeking to be relieved of the annual rental rate of $7.15 per pole it had agreed to in its 1980 contract with Florida Power. Acton requested that a rate of $2.21 be inserted into the contract. In response to these complaints Florida Power contended, *inter alia*, that a grant of the relief requested by the cable companies would effect a taking of private property without just compensation, in violation of the fifth amendment to the United States Constitution.[5]

In July 1981, the Commission's Common Carrier Bureau issued a Memorandum Opinion and Order in response to the Teleprompter and Acton complaints. J.S. App. 36a-47a. The Bureau concluded that $1.79 per pole attachment

[5] Florida Power also challenged certain factual allegations contained in the complaints, the cost formula relied on by the cable companies, the unreasonableness of the low rates requested by the cable companies, and retroactive application of the Act's provisions to the Teleprompter contract, which had been in existence prior to passage of the Act. In its responses Florida Power argued that either the existing annual rental rates or higher rates of approximately $10 per pole would be fair and just. See J.A. 82, 184.

per year (*i.e.*, $.42 lower than the rate requested by Acton and $.44 lower than the rate requested by Teleprompter) was the maximum just and reasonable rate Florida Power could charge under the Pole Attachments Act and that Florida Power must refund all excess payments from the date of the filing of the complaints, plus interest.[6] The Bureau terminated the existing rates and ordered that an annual rate of $1.79 for each pole attachment be substituted in the contracts. The Bureau made no mention of Florida Power's constitutional challenge based on the just compensation clause.

In November 1981, Cox filed a complaint against Florida Power with the Common Carrier Bureau. Relying on the Bureau's Teleprompter-Acton order, Cox requested that the Bureau reduce to $1.79 the annual rental rate it could be charged pursuant to its contract with Florida Power. In March 1982, the Bureau issued a Memorandum Opinion and Order granting Cox's request. J.S. App. 29a-35a. The Bureau again ordered that the rate prescribed by the contract be terminated and that an annual rate of $1.79 for each pole attachment be substituted. As in the Teleprompter-Acton case, the Bureau failed to address the constitutional arguments raised in Florida Power's response.[7]

Florida Power sought Commission review of the Bureau's Teleprompter-Acton and Cox orders. In September

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[6] The Common Carrier Bureau disallowed the majority of the maintenance and administrative expenses documented by Florida Power. It also permitted recovery of less than one-third of Florida Power's tax expenses.

[7] Florida Power presented other challenges to the Cox complaint, including objections to the methodology used to calculate the new rate and to retroactive application of the Act to a preexisting contract. Florida Power took the position that the rates that had been negotiated and that were being charged under the Cox contract were just and fair and that a higher rate of roughly $17 per pole also would be fair and just since this was the annual pole cost Cox would incur if it owned an already-constructed pole system. J.A. 252.

1984, the Commission issued a single order denying Florida Power's applications for review. J.S. App. 21a-28a. The Commission rejected Florida Power's constitutional arguments on the ground, *inter alia*, that, in the Commission's view, a Commission-ordered abrogation of a contractual pole attachment rate did not constitute the sort of physical occupation without compensation that had been held to constitute a taking in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. Florida Power filed a petition for review of the Commission's order in the United States Court of Appeals for the Eleventh Circuit. The court of appeals held in a *per curiam* opinion that the Commission's order must be vacated. J.S. App. 1a-20a. The court concluded that the Commission had authorized a permanent physical occupation of Florida Power's private property. Therefore, under the Supreme Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra*, the Commission's order effected a taking for which just compensation was due under the fifth amendment.

In reaching its conclusion, the court of appeals held that cable company access to Florida Power's property had been authorized by the government and was in no legitimate sense "invited" by Florida Power. Assuming that Florida Power had initially "invited" the cable companies' access to its poles by dedicating pole space to television cables and entering into written agreements with cable companies, it was "nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate. . . .While [the cable companies] may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC." J.S. App. 10a-11a.

The court of appeals concluded also that the occupation of Florida Power's property authorized by the Commission was permanent. The court noted that under the Commis-

sion's stated policy, Florida Power would not be free to refuse to renew its agreements with the cable companies. Indeed, the court observed that "the FCC has made it quite clear that it intends to require continued provision of space at FCC-ordered rates." J.S. App. 12a. In any event, the reduced rates had been inserted into Florida Power's contracts with the cable companies, and so "at the very least" Florida Power would have to suffer the cable companies' presence on its property for the duration of those contracts. *Id.* at 13a.

Finally, the court of appeals held that the Commission had clearly authorized a physical occupation of Florida Power's property: "[i]n regard to the physical attachment then, *Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner." J.S. App. 14a.

Having concluded that the Commission order effected a taking of Florida Power's property, the court of appeals turned to the question whether just compensation for the taking could properly be determined by the Commission pursuant to the formula prescribed by Congress. Relying on the separation of powers principles enunciated in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), and applied in several more recent cases, the court held that by authorizing the Commission to make determinations of the compensation to be provided to pole owners pursuant to the binding formula set forth in the Pole Attachments Act, Congress precluded any true just compensation determination. In limiting "just and reasonable" rates to an amount determined by application of the statutory formula Congress had impinged on the exclusive province of the judiciary by impermissibly restricting the range of compensation that could be awarded for a Commission-ordered taking.

The court of appeals denied petitions for rehearing filed by the Commission and the cable company intervenors, with no member of the court voting in favor of rehearing en banc. J.S. App. 50a-51a.

SUMMARY OF ARGUMENT

The fifth amendment to the Constitution provides that private property may not be taken without just compensation. In a long line of precedent, reaffirmed in the recent case of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court has set forth the traditional rule that a permanent physical occupation of property is, without more, a taking within the meaning of the fifth amendment.

The Commission's order applying the Pole Attachments Act to Florida Power fits squarely within the *per se* rule set forth in *Loretto*. By the order, the government authorizes a direct physical invasion of Florida Power's property by a third party that is continuing in nature and extends for an indefinite period of time. As in *Loretto*, the proper conclusion is that the order has effected a taking for which the property owner is entitled to just compensation.

The Pole Attachments Act impermissibly interferes with Florida Power's right to have a constitutionally adequate determination of just compensation. Under the Act, the Commission is bound to impose rental rates pursuant to a formula set by Congress. The formula limits the agency to a calculation based on certain costs, and it involves no consideration of the traditional measure of just compensation—fair market value. The opportunity for judicial review of Commission orders does not correct this deficiency. Because of the limitations imposed on the Commission by the statute, the reviewing court lacks a factual basis for determining whether the rental rate set by the

Commission satisfies constitutional standards for just compensation.

Thus, the Pole Attachments Act effects a taking and fails to provide for a proper determination of just compensation. Accordingly, the court of appeals properly concluded that the Pole Attachments Act is inconsistent with the dictates of the fifth amendment and that it is therefore unconstitutional and invalid.

ARGUMENT

The Federal Communications Commission, acting pursuant to the Pole Attachments Act, in this case authorized cable television companies to occupy space on Florida Power Corporation's poles at rates less than one-third those specified in existing contracts. The court of appeals correctly concluded that the Commission's order amounted to a taking of Florida Power's private property and that that taking was unaccompanied by the determination of just compensation that is required by the fifth amendment to the Constitution.

I. The Commission's Order Pursuant To The Pole Attachments Act Constituted A Taking Of Florida Power's Private Property Within The Meaning Of The Fifth Amendment To The United States Constitution.

The fifth amendment to the United States Constitution provides in pertinent part that private property shall not be taken for public use without the payment of just compensation. U.S. Const. amend. V. The threshold question in this case is whether the action of the Federal Communications Commission pursuant to the Pole Attachments Act authorizing cable companies to occupy space on Florida Power's poles at a rate far lower than that specified in existing contracts amounted to a taking of Florida Power's private property. See, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S. Ct. 2561, 2566 (1986); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 122

(1978). Because the Commission order authorized a permanent physical occupation of Florida Power's property, it effected a taking within the meaning of the fifth amendment.

A. Application of This Court's Decision in *Loretto v. Teleprompter Manhattan CATV Corp.* Mandates the Conclusion that the Commission's Order Effected a Taking of Florida Power's Private Property.

In concluding that the Commission's order effected a taking of Florida Power's private property, the court of appeals relied on this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto* the Court held that application of a New York statute that prevented landlords from interfering with the installation of cable television equipment on their rental property and that limited the amount that the cable company could be required to pay to the landlord effected a taking of the landlords' property within the meaning of the fifth amendment as made applicable to the states by the fourteenth amendment. The Commission's order applying the Pole Attachments Act to require that Florida Power permit cable companies to maintain their equipment on Florida Power's poles at rates calculated pursuant to a formula set out in the Act accomplishes virtually the same result as application of the New York statute considered in *Loretto*. The Court's decision in that case, therefore, mandates the conclusion that there was a taking of Florida Power's property here.

The statute at issue in *Loretto* provided that a landlord was required to permit a cable television company to install its facilities on his property and could not demand payment from the company in excess of an amount determined by a state commission to be reasonable. Prior to the 1973 passage of the statute, Loretto's predecessor had granted Teleprompter, a cable company, permission to install cables on the roof of Loretto's building. After she purchased the

building, Loretto discovered the equipment. She subsequently brought a class action against Teleprompter on behalf of all owners of real property in New York State on which Teleprompter had placed cable components, alleging that the installation was a trespass and, to the extent it relied on the New York statute, a taking without just compensation. The New York Court of Appeals held that application of the statute did not constitute a taking of Loretto's property. 458 U.S. at 421-25.

This Court reversed, holding that the New York statute effected a taking of Loretto's property for which she was entitled to receive just compensation under the fifth and fourteenth amendments. The Court concluded that the statute authorized a permanent physical occupation of real property and that the cable installation therefore constituted a taking under the traditional physical occupation test. That test, which is based on a long line of this Court's decisions, distinguishes between a permanent physical occupation, which always amounts to a taking, and a physical invasion short of an occupation or a mere restriction on the use of property, which may or may not constitute a taking depending on the outcome of an ad hoc inquiry. 458 U.S. at 427-35. The Court concluded that the traditional physical occupation test retained force in view of the seriousness of the invasion of property interests normally resulting from a permanent physical occupation and in view of the evidentiary benefits afforded by the rule. *Id.* at 435-38.

The Court noted that the cable installation on Loretto's building involved direct physical attachment of plates, wires, bolts, and screws to the building, and that the physical occupation was permanent, rather than "temporary" or "intermittent." 458 U.S. at 438-39. The Court found it irrelevant that Loretto could escape the statutory requirements by ceasing to rent her building to tenants. *Id.* at 439 n.17.

The Court recognized that the New York statute had been found to serve a legitimate public purpose. It held, however, that a permanent physical occupation of property authorized by government constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434-35. The Court rejected the contention that the statute was simply a permissible regulation of the use of real property since it applied only to buildings used as rental property. The Court "fail[ed] to see . . . why a physical occupation of one type of property but not another type is any less a physical occupation." *Id.* at 438-39. In response to the observation that the cable installation occupied only a small area on the roof of Loretto's building, the Court explained that the existence of a taking did not depend on the volume of space occupied by the cable installation. *Id.* at 438 n.16. The Court remanded to the state court for a determination of the amount of compensation due for the taking. *Id.* at 441-42.

The holding in *Loretto* applies with full force to this case.[8] As in *Loretto*, the physical occupation is by a third party, the cable company that owns the equipment. The installations on Florida Power's poles are similar to the installation on Loretto's building. Indeed, the court of appeals found that with respect to the physical attachment "*Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes,

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[8] In its final order, the Commission suggested that this case is distinguishable from *Loretto* because the latter involved a physical occupation "without any compensation." J.S. App. 28a. In fact, the statute at issue in *Loretto* authorized the State Commission on Cable Television to determine a "reasonable" amount that could be charged to cable companies—a measure that could exceed a nominal sum if the landlord could make the appropriate showing. In any event, the adequacy of the compensation provided for by the Pole Attachments Act is a separate question from the issue of whether a taking has occurred.

wires, bolts and screws upon the property of a reluctant owner." J.S. App. 14a.[9]

Here, as in *Loretto*, the presence of the cable installation on private property is authorized by government action. In *Loretto*, the original installation of the cable equipment occurred pursuant to an agreement between the cable company and the building's previous owner, prior to the passage of the statute at issue. 458 U.S. at 421-23; *id.* at 443 (Blackmun, J., dissenting). Passage of the statute and its application to Loretto's building constituted government action that effected a taking of Loretto's property. The Court did not in any way suggest that the force of Loretto's taking claim was diminished by her predecessor's initial invitation to the cable companies or by Loretto's sufferance of the cable equipment during the five years between her purchase of the building and the time she brought suit.

In this case, the passage of the Pole Attachments Act and the Commission's order authorizing the cable installations at a lower rental rate effected the taking of Florida Power's property. The court of appeals correctly concluded that the fact that the cable equipment originally

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[9] The amount of space occupied by the cable equipment is quite significant when one considers cumulatively all of the poles to which a cable company's equipment is attached. Other cable companies could seek to occupy space on Florida Power's poles in the future. See, *e.g.*, *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986); *Loretto*, 458 U.S. at 437. In any event, the Court made clear in *Loretto* that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436-37 (footnote omitted). See also *id.* at 426.

The cable companies attempt to minimize the importance of the physical intrusion by referring to the pole space they occupy as "surplus." However, the landlord in *Loretto* explicitly acknowledged that she had no alternative uses for the space on her roof that was occupied by the cable installation. See 458 U.S. at 453-54 (Blackmun, J., dissenting). The Court apparently viewed that admission as irrelevant.

was installed on Florida Power's poles pursuant to voluntary agreements between Florida Power and the cable companies did not affect the conclusion that the Commission's action had effected a taking of Florida Power's property. As the Court noted, the original invitation to the cable companies to install their equipment on Florida Power's poles was subject to certain conditions, including the negotiated annual rental rates. J.S. App. 10a. The Commission's order drastically reduced the annual rental rates Florida Power can charge under the contracts, to a level less than one-third the rate Florida Power had accepted voluntarily. The substitution of a new rate worked a fundamental change in the terms under which the physical occupations take place, with the result that the occupations have been converted from an arrangement that is voluntary to one imposed by government action.[10]

The government contends that this case differs from *Loretto* in that, while the New York statute explicitly prohibited interference with cable installation, neither the Pole Attachments Act nor the Commission order on its face requires that cable companies be granted access to utility poles. Brief for Federal Appellants ("Gov't Br."), pp. 14-18. For this reason, according to the government, the physical occupation in this case cannot be regarded as interfering with Florida Power's property rights. The gov-

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[10] To present an extreme case, an occupation could hardly be said to be consensual if the original rental rate negotiated by the parties had been $1 million per year, but subsequent government action imposed a ceiling of $1 per year.

Similar principles apply in the common law of trespass. A person who enters upon property with limited authorization and subsequently exceeds the limitations placed on the entry is no less a trespasser than one who enters upon the property with no authorization. See *Restatement (Second) of Torts* § 168 (1965); *Sabo* v. *Reading Co.*, 244 F.2d 692, 694 (3d Cir.), *cert. denied*, 355 U.S. 847 (1957); *Burton Constr. & Shipbldg. Co.* v. *Broussard*, 154 Tex. 50, 58-59, 273 S.W.2d 598, 603 (1954).

ernment apparently seeks to create the inference that it may be within Florida Power's power to withdraw from its agreements with the cable companies, thereby freeing itself from any unwanted physical intrusions on its poles.

In reality, the Commission's order accomplishes far more than the government suggests. When considered in context with the legislative history of the Pole Attachments Act and with other Commission actions, the order amounts to a requirement that Florida Power continue to permit the cable companies to occupy space on its poles and that it do so at the much lower rental rate imposed by the Commission.[11] In its report accompanying the pole attachments legislation, the Senate committee recognized the possibility that a utility might discontinue provision of pole attachment space to a cable company in order to avoid Commission regulation. The committee expressed the view that under the Act "the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that [cable television] pole attachment rights were discontinued solely to avoid jurisdiction." S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977). The Commission has asserted jurisdiction under the Act to require continued provision of pole attachments at Commission-ordered rates. In promulgating rules to implement the Pole Attachments Act, the Commission, citing the Senate report, stated in a discussion of access to utility poles: "Even where there is currently no [cable television] attachment or agreement therefor, the

[11] Even if the Commission did not authorize indefinite occupation by cable companies, the effect of the orders in this case is to authorize occupation for some period of time. Florida Power's contracts with the cable companies incorporate obligations to allow physical occupation during certain time periods. See *supra*, nn.3&4. The Commission's substitution in the contracts of a lower rental rate has the effect of requiring that Florida Power permit occupation by the cable companies on government-imposed terms at least for the remaining lives of the contracts.

Commission has jurisdiction if (1) there is communications space designated on the poles and (2) the utility has discontinued [cable television] attachment in order to avoid such Commission jurisdiction." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1589 (1978).

The Commission has exercised its claimed jurisdiction to regulate access to utility poles by preventing attempts by utilities to discontinue pole attachments. In cases in which utilities have ordered cable companies to disconnect their equipment the Commission has entered stays to prevent such action.[12] For example, in *Whitney Cablevision* v. *Southern Indiana Gas & Electric Co.*, File No. PA-84-0017, FCC Mimeo No. 841 (Nov. 16, 1984), the utility ordered the cable company to remove its equipment because of unauthorized and unsafe attachments that breached the parties' agreement. The Commission issued a stay based on its belief that it was reasonably likely that the cable company could show that the attempted termination was motivated by the utility's desire to avoid pole attachment rate regulation. In *Tele-Communications, Inc.* v. *South Carolina Electric & Gas Co.*, File No. PA-83-0027, FCC Mimeo No. 3994 (April 19, 1985), the Commission issued a final order preventing a utility from terminating a pole attachment agreement, despite the utility's citation of numerous safety violations and unauthorized attachments by the cable operator and despite the utility's provision of six

[12] Cable companies have sought Commission intervention to prevent termination of pole attachment arrangements pursuant to Commission Rule 1.1403. Subsection (a) of the rule states that "[a] utility shall provide a cable television system operator no less than 60 days written notice prior to (1) removal of facilities or termination of any service to those facilities, such as removal or termination arising out of a rate, term or condition of a cable television pole attachment agreement. . . ." 47 C.F.R. § 1.1403(a) (1985). Upon receipt of such a notice, a cable television company may seek a "temporary stay" of the removal pursuant to subsection (b) of the rule. 47 C.F.R. § 1.1403(b) (1985).

months' notice of termination. See also *Bailey* v. *Mississippi Power & Light Co.*, File No. PA-83-0026, FCC Mimeo No. 36118 (Sept. 11, 1985) (mandating access to poles by a second cable company where the utility had declined to contract with the cable company for reasons including safety, manpower limitations and other economic considerations.)[13]

It is clear from the Commission's past statements and actions that it would not permit Florida Power to terminate its pole attachment arrangements with the cable companies in order to free itself from a physical occupation at an unacceptably low rental rate, a fact conceded by the cable companies in their brief. Brief for Appellants Group W Cable, Inc., National Cable Television Ass'n, Inc., and Cox Cablevision Corp. (hereafter "Cable Companies' Br." or "CC Br."), p. 26. The Commission views such contract terminations as "retaliatory" and as attempts to evade the Commission's jurisdiction that would justify an order preventing termination. As the court below recognized, "[t]he hard reality of the matter is that if Florida Power desires to exclude the cable companies, for whatever reason, they are powerless to do so." J.S. App. 11a.[14]

The government nevertheless implies that the Commission might respond differently to an attempt by Florida Power to exclude the cable companies than it has in past cases involving other companies. It fails to explain, however, why the Commission would reach a different result, noting only (Gov't Br., pp. 16-17) that the Commission has not attempted to define the limits of a utility's power to exclude a cable company on the ground that the new rental rate imposed by the Commission is unacceptable. As the court of appeals noted, it is difficult to imagine "how Florida Power, or any utility for that matter, could issue a disconnect order under such circumstances and have it escape being deemed retaliatory by the FCC." J.S. App. 12a n.4. In view of the Commission's past statements and actions, its orders in this case must be regarded as encompassing a requirement that Florida Power continue to permit physical occupation of its poles at the rate ordered by the Commission, for an indefinite period.[15]

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[13] For the Court's convenience we are lodging copies of the three Commission decisions referred to above with the Clerk of the Court.

[14] Appellants point to the fact that Florida Power entered into a contract with Acton and failed to terminate its contracts with Cox and Teleprompter after the effective date of the Pole Attachments Act. The cable companies had committed to pay Florida Power rental rates that were determined through negotiation by the parties. Acceptance of those arrangements should in no way be regarded as a waiver of Florida Power's right to claim just compensation in connection with the Commission's subsequent imposition of a radically lower rate.

[15] Florida Power's taking claim is therefore ripe for review, contrary to the government's suggestion in its brief (p. 16 n.20). In response to complaints filed by the cable companies, the Commission has issued a final order determining a specific maximum rate that Florida Power may charge the cable companies. There is no reason to require Florida Power to engage in a futile attempt to exclude the cable companies as a prerequisite to obtaining resolution of its constitutional objections to the order. We note that the Court in *Loretto* decided the takings claim even though the record indicated that Loretto had never sought to have the cable equipment removed from her building. See 458 U.S. at 443 n.2 (Blackmun, J., dissenting).

This case differs from recent cases in which this Court has held that takings claims were not ripe for review. In *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), the appellants challenged the mere enactment of zoning ordinances before it was clear how those ordinances would be applied. In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S. Ct. 3108 (1985), the developer had failed to seek variances from a development plan or to take advantage of a state compensation procedure. And in *MacDonald, Sommer & Frates* v. *Yolo County, supra*, the county planning commission had not finally determined how it would apply regulations to the property in question. Here, the relevant governmental body has made a final determination of the rental rate Florida Power will be permitted to charge and has made it clear through other statements that physical occupation of Florida Power's poles by the cable companies must be permitted indefinitely.

Contrary to appellants' contentions, there can be no question that the physical occupation ordered by the Commission is permanent. By its very nature, the attachment of cable equipment to utility poles by wires, bolts, and screws is not a "temporary" or "intermittent" occupation (compare *Loretto*, 458 U.S. at 438-39). It is a direct and continuing invasion of Florida Power's property. Moreover, as we explained above, the Commission's order in effect requires Florida Power to permit physical occupation on terms imposed by the Commission for the duration of the contracts and for an indefinite period thereafter. The court of appeals correctly concluded that "the extent of the occupation in the case of Florida Power not only satisfies *Loretto*'s permanency requirement, but significantly exceeds it." J.S. App. 13a.

The cable company appellants appear to assume that their physical occupation of Florida Power's poles will continue indefinitely. Nevertheless, they suggest that the physical occupation of Florida Power's poles by the cable equipment should not be regarded as permanent because under the terms of the contracts Florida Power may some day order removal of the cable equipment if it needs the space for its own utility-related purposes. But even then, as the cable companies recognize, it is uncertain whether removal would ever occur, since the Commission might simply order that the cable companies provide larger poles. See CC Br., p. 25 n.58. Moreover, the mere possibility that the Commission might at some point allow Florida Power to end the physical occupation of its poles under limited circumstances is not sufficient to render the occupation non-permanent. This Court in *Loretto* rejected Teleprompter's contention that there could be no taking in that case because Loretto might choose at some point to cease using her building for rental purposes and would then be free to insist that the cable company remove its equipment. 458 U.S. at 439 n.17. Here, too, there is a

taking despite the possibility that circumstances might some day permit termination of the physical occupation.

B. The Holding of *Loretto* Applies with Full Force to a Permanent Physical Occupation of the Private Property of a Regulated Utility.

Appellants, who presumably recognize the close parallel between the facts here and those of *Loretto*, have sought some way to distinguish the two cases. However, the purported distinction on which they have chosen to rely—that Florida Power is a regulated utility, while Loretto was not—is not a basis for treating this case differently from *Loretto*.[16]

Nothing in *Loretto* itself suggests that the Court's holding is inapplicable to physical occupation of property owned by a highly regulated entity. Loretto was engaged in renting apartments and (as the Court expressly recognized) was therefore subject to various forms of regulation, including rent control, building codes, and requirements concerning utility connections and mailboxes. See 458 U.S. at 440. The Court rejected the contention that requiring Loretto to permit cable installations on her building at a mandated rate was merely a permissible regulation of the use of real property, as opposed to a taking. According to the Court, attachment of cable equipment to rental property was unquestionably a physical occupation and therefore satisfied the traditional rule; the type of property occupied should not affect the analysis. *Id.* at 439. The Court clearly did not view Loretto's interest in receiving just compensation as diminished by the business nature of her property

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[16] The cable industry's argument on this point rings hollow in light of Teleprompter's argument in *Loretto* that Loretto could not claim the protection of the fifth amendment because as a landlord she was subject to extensive regulation. Here, Teleprompter (now known as Group W) and the other members of the cable industry are contending that this case is not governed by *Loretto* because that case did not involve property of a highly regulated entity.

or by the fact that she was subject to various forms of regulation.

There can be no dispute that the protection of the just compensation clause extends to property owned by a public utility.[17] This Court has so held on a number of occasions. For example, in *Western Union Telegraph Co.* v. *Pennsylvania Railroad*, 195 U.S. 540 (1904), the Pennsylvania Railroad requested that Western Union remove its poles and lines from the railroad right of way so that the railroad could rent the same space to another telegraph company. Western Union objected, arguing that the right of way had become a "public highway" and was therefore subject to public uses. While the Court acknowledged that a railroad right of way constituted "property devoted to a public use," it went on to explain that such a right of way "is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation." *Id.* at 573.[18] State courts have

[17] This Court recently rejected a claim that the constitutional protection afforded to utilities should be narrower than that available to other entities. In *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 106 S. Ct. 903 (1986), the California Public Utilities Commission had issued an order requiring Pacific Gas & Electric to carry third parties' messages in the unused space in its billing envelopes. The CPUC argued that because PG&E was a regulated utility it had a lesser right to freedom from state regulation of its speech than other entities and that it lacked a full constitutionally protected property interest in the unused space in its billing envelopes. *Id.* at 912. The Court noted that it had rejected the former notion in *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980), and that the latter argument "misperceives . . . the relevant property rights." 106 S. Ct. at 912.

[18] See also, *e.g.*, *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961) (compensation due for taking of flowage easement owned by utility company); *ICC* v. *Oregon-Washington R.R. & Navigation Co.*, 288 U.S. 14, 40-41 (1933) ("[t]he railroads, though dedicated to a public use, remain the private property of their owners, and their

likewise stressed the "principle that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property. Neither the property nor its use can be taken for a compulsory price which falls below the measure of fair and just compensation." *Alabama Power Co.* v. *Alabama Public Service Commission*, 422 So. 2d 767, 769 (Ala. 1982) (quoting *Alabama Public Service Commission* v. *Southern Bell Telephone & Telegraph Co.*, 253 Ala. 1, 12, 42 So. 2d 655, 663 (1949)). See also, *e.g.*, *Kansas City Power & Light Co.* v. *State Corp. Commission*, 238 Kan. 842, 847, 715 P.2d 19, 24 (1986) ("A utility company has the same rights under the taking clause as other private entities.") Thus, the fact that an entity like Florida Power enjoys the rights granted to a public utility and bears the responsibility of providing service to the public does not affect the conclusion that any taking of its property must be accompanied by the payment of just compensation.

Appellants make much of the fact that some utility regulation entails a governmentally-imposed requirement that utilities make physical interconnections with their customers. Whatever may be the proper constitutional analysis in such physical interconnection cases, they are not analogous to this case. Physical interconnection requirements involve the services a company is obliged to provide by virtue of its status as a public utility. Thus, the duty of an electric utility to provide electricity to the public in a safe, efficient, and nondiscriminatory manner might provide the basis for requiring it to make a physical connection with another company. See 2 Nichols, *The Law of Eminent-Domain* § 5.08, at 5-163 (rev. 3d ed. 1985). But such a principle would not extend to other physical intrusions that are unrelated to the utility's obligation to provide electricity.

assets may not be taken without just compensation"); *Missouri Pac. Ry.* v. *Nebraska*, 217 U.S. 196, 206, 208 (1910) (requirement that railroad construct switch connections constituted a taking).

The law is clear that public utilities may not be required without just compensation to provide additional services, above and beyond those they are committed to provide by virtue of their public utility status. Imposition on a public utility of "burdens that are not incident to its engagement" (*Northern Pacific Railway* v. *North Dakota*, 236 U.S. 585, 595 (1915)) may amount to a taking of property for public use without just compensation. *E.g.*, *Delaware, Lackawanna & Western Railroad* v. *Town of Morristown*, 276 U.S. 182, 193-95 (1928) (regulation requiring railroad to provide space on its ground for private taxicabs effected a taking for which compensation was due); *Pacific Telephone & Telegraph Co.* v. *Eshleman*, 166 Cal. 640, 677-687, 137 P. 1119, 1133-37 (1913) (order requiring physical connection outside dedicated use was a taking without just compensation); *Georgia Power Co.* v. *Georgia Public Service Commission*, 211 Ga. 223, 227, 85 S.E.2d 14, 18 (1954) (requirement that public utility devote its property to service it had never professed to render is equivalent to taking property for public use without just compensation); *Nicoma Park Telephone Co.* v. *State*, 198 Okla. 441, 444-45, 180 P.2d 626, 629-30 (1947) (order requiring extension of service constituted a taking); see also *Great Northern Railway* v. *Minnesota*, 238 U.S. 340, 345-47 (1915) (order requiring installation of scales extended beyond the scope of the railroad's duty and constituted a taking.

It is equally clear that the pole attachments scheme does not involve services provided by Florida Power in its public utility capacity, but only its non-utility role as a renter of space on its property. Numerous state courts and utility commissions addressing this issue have ruled that the renting of space on utility poles to cable television companies is not a public utility service. *E.g.*, *Re Southern Bell Telephone & Telegraph Co.*, 65 Pub. Util. Rep. 3d (P.U.R.) 117, 120-21 (Fla. Pub. Serv. Comm'n 1966) (". . . This [rental of pole space] involves the right of a public utility to control the use of its own property by others when that use

is for others' profit and does not involve the public duties of the utility."); *Illinois-Indiana Cable Television Association* v. *Public Service Commission*, 427 N.E.2d 1100, 1109 (Ind. App. 1981) ("[t]he employment of utility poles in the suspension of coaxial cables for the transmission of television signals is not a use devoted to the purposes in which electric and telephone utilities are engaged.")[19]

Florida Power made no commitment to provide space on its poles as a quid pro quo for achieving public utility status. Moreover, the cable companies cannot be regarded as consumers of traditional utility services when they rent space on the poles. Pole attachment arrangements constitute normal commercial relationships between two businesses, one of which seeks to rent space from the other, as opposed to the special relationship traditionally thought to exist between an electric utility and its electric power customers.[20]

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[19] Accord *Snohomish County Pub. Util. Dist.* v. *Broadview Television Co.*, 91 Wn. 2d 3, 9-10, 586 P.2d 851, 855-56 (1978); *Ceracche Tel. Corp.* v. *Public Serv. Comm'n*, 49 Misc. 2d 554, 557, 267 N.Y.S.2d 969, 973 (Sup. Ct. 1960); *International Cable T.V. Corp.* v. *All Metal Fabricators, Inc.*, 66 Pub. Util. Rep. 3d (P.U.R.) 446, 462 (Cal. Pub. Util. Comm'n 1966); *WCOG, Inc.* v. *Southern Bell Tel. & Tel. Co.*, 64 Pub. Util. Rep. 3d (P.U.R.) 314, 316-17, (N.C. Util. Comm'n 1966); but see *Re Cable Television Pole Attachments*, 49 Pub. Util. Rep. 4th (P.U.R.) 128 (Ky. Pub. Serv. Comm'n 1982).

[20] Amici err in suggesting (*e.g.* Nor-West Cable Br., pp 8-10) that by renting pole space to cable companies in the past utilities have "dedicated" their poles to the cable equipment, thereby voluntarily committing themselves to continue to allow the poles to be used for that purpose. A utility's voluntary negotiation of an ordinary rental contract at market rates does not commit the utility to rent the same space forever at rates drastically lower than those originally negotiated. See *International Cable T.V. Corp.* v. *All Metal Fabricators, Inc.*, *supra*:

> [The utility's] willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles is neither an offer nor a providing of "public utility service," since

Several state courts have expressly concluded that space on utility poles constitutes private property that may not be taken by means of physical attachments without the payment of just compensation. In *New York Telephone Co.* v. *Town of North Hempstead*, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694 (1977), the town claimed the right in the exercise of its police power to attach street lighting equipment to the plaintiff's utility poles. The New York Court of Appeals held that the town was actually seeking to appropriate a portion of the poles and that the case presented "a clear instance of a taking of private property for the use of the municipality." 41 N.Y.2d at 697, 395 N.Y.S.2d at 147, 363 N.E.2d at 697. Similarly, in *Burlington Light & Power Co.* v. *City of Burlington*, 93 Vt. 27, 33-34, 106 A. 513, 516 (1918), the court stated that an ordinance granting the city the right to use the top gain of existing utility poles to attach its own electric wires would amount to a taking of property without compensation. See also *State ex rel. Wisconsin Telephone Co.* v. *City of Sheboygan*, 111 Wis. 23, 40-41, 86 N.W. 657, 662 (1901) (city's claim of right to use top of telephone company's poles for fire alarm system did not come within its police power).

In sum, Florida Power's status as a public utility in no way undermines the conclusion that the Commission's order pursuant to the Pole Attachments Act effected a taking of Florida Power's private property. The state cases involving attachments to utility poles confirm the conclusion that the Commission's order effected a taking of Florida Power's property for which just compensation must be paid.

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the utility does not hold out such contracts impartially to the general public or [sic] does it thereby provide any "service" related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling.

66 Pub. Util. Rep. 3d (P.U.R.) at 462.

In a variation on their public utility arguments, appellants attempt to avoid the application of the just compensation clause by characterizing the Commission's action pursuant to the Pole Attachments Act as "ratemaking" or "regulation." But Congress has not merely provided for the setting of rates; nor has it simply regulated Florida Power's use of its property. Rather, Congress has authorized a continuing physical intrusion by a third party on Florida Power's property on government-imposed terms that are very different from those voluntarily negotiated by Florida Power. *Loretto* makes it clear that such a physical intrusion constitutes more than mere ratemaking or regulation. The Court there clearly distinguished between rent control and other forms of regulation of the landlord-tenant relationship, on the one hand, and permanent occupation of a landlord's property by a third party at a state-ordered rate, on the other. See 458 U.S. at 439-40. While the former are analyzed under the multifactor inquiry used for nonpossessory governmental activity, the latter on its face constitutes a taking. Thus, even if the government action with respect to pole attachments resembles ratemaking or regulation in some ways, the fact that it entails a permanent physical occupation at the Commission-ordered rate requires that it be classified as a taking.[21]

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[21] The government in its brief (pp. 19-20) cites this Court's summary dismissal in *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983), in support of its contention that this case involves regulation, not a taking. In *Fresh Pond*, the Supreme Judicial Court of Massachusetts had affirmed by an equally divided court, without opinion, the judgment of the lower court that local restrictions on removing apartments from the rental market were constitutional. *Fresh Pond Shopping Center, Inc.* v. *Rent Control Bd.*, 388 Mass. 1051, 446 N.E. 2d 1060, *appeal dismissed sub nom. Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983). The facts of this case, involving continuing physical attachment of cable equipment, are unquestionably closer to *Loretto* than to *Fresh Pond*.

Cable company appellants suggest in their brief (CC Br., p. 23) that attachment of cable equipment to Florida Power's poles can never be a taking because Florida Power is authorized by the state utility commission to charge its utility customers rates sufficient to yield a nonconfiscatory return. Apart from the inherent unfairness of having electricity consumers subsidize consumers of cable television, if that argument were valid, no regulated utility could ever assert a takings claim based on physical occupation of its property because the ability to shift the burden to utility customers would mean that the utility would never suffer any loss.[22] In fact, a utility that must raise its rates to compensate for a loss of income from its nonutility businesses may lose utility customers as a result. Moreover, even if a utility were assured of earning a nonconfiscatory rate of return on its assets this would not amount to payment of just compensation for the loss to the pole owner caused by the physical intrusion of cable equipment. The right to exclude such equipment clearly has substantial value to the pole owner, the loss of which would not be compensated in the utility rate of return.[23]

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[22] A similar argument was rejected by this Court in *Northern Pacific Ry., supra*, 236 U.S. at 598:

> It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If the rates are exorbitant, they may be reduced. Certainly, it would not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action.

[23] Cable equipment may interfere with the pole owner's efforts to maintain and repair the poles. For example, it may be necessary to use a cherry picker to repair poles on which the cable company has placed amplifiers (used to boost cable signals). Moreover, the presence of cable equipment may require the pole owner to obtain the cooperation of the cable company before taking certain actions. Compare *Loretto*, 458 U.S. at 441 n.19. Thus, a pole owner is not indifferent to the presence of cable equipment even if it receives a utility rate of return on its physical investment.

C. Application of the Ad Hoc Inquiry Used for Cases That Do Not Involve A Permanent Physical Occupation Also Leads to the Conclusion That There Has Been A Taking of Florida Power's Property.

The cable company appellants argue in their brief (CC Br., pp. 22-23) that the Commission's order in this case would not be found to constitute a taking under the ad hoc balancing test used in cases that do not involve permanent physical occupation. That argument is beside the point. The traditional rule is that a permanent physical occupation constitutes a taking "without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432. Such a rule is useful precisely because it avoids the need to undertake ad hoc inquiries. Nevertheless, we show below that the Commission's order clearly effects a taking under the ad hoc balancing approach.

This Court has identified three factors as particularly significant in resolving whether government action effects a taking—the economic impact of the action, the extent to which it interferes with investment-backed expectations, and the character of the government action. *Penn Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 124. With respect to the third factor, the state cases cited in the preceding section show that pole attachment requirements have traditionally been regarded as the type of government action that qualifies as a taking. The Court in *Loretto* explained at some length why government-mandated physical attachment of cable equipment to business property is properly viewed as a taking. Both cables and related equipment (*e.g.*, amplifiers) are attached directly to the poles with screws or nails and bolts. Attachment prevents the owner of the property from possessing the occupied space, from excluding the occupier from possession and use of the space, and from himself making any use of the space. Moreover, the owner must permit a stranger to invade and occupy his property and must seek the co-

operation of the stranger if he wishes to repair, demolish, or construct in an area occupied by the cable equipment.

The economic impact of the Commission's order is obvious. In the absence of the order Florida Power could, pursuant to the contractual terms it previously negotiated, obtain pole attachment rents of more than three times the amount it is permitted to recover under the order.[24] The Commission's order also interferes with Florida Power's reasonable investment-backed expectations. Florida Power initially entered into pole attachment arrangements in the expectation that it would receive the rental rates negotiated by the parties and that it would be free to terminate the agreements pursuant to the contractual terms. The Commission's order radically changes the terms of the arrangements.[25]

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[24] The ability to request an increase in rates charged to its utility customers would not compensate Florida Power for the loss it would suffer as a result of the Commission order. See *supra*, pp. 28-29. Moreover, to the extent Florida Power could raise its rates to compensate for the loss, the effect would be subsidization by utility customers of the cable companies.

[25] The Court in *Penn Central* noted that a restriction on use of real property may constitute a taking if it is "not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. at 127. There is considerable doubt whether that requirement is satisfied in this case. Appellants point to Congress's stated purpose of preventing pole owners from charging unreasonable rates for attachment of cable equipment. However, Congress' desire to transfer economic benefits from utility customers to cable companies would not justify physical invasion of Florida Power's property without adequate compensation. Moreover, there has been no showing that Florida Power's rates were unfair. In material submitted to the Commission, Florida Power showed that the rates it had negotiated with the cable companies are far below the amounts the companies would have been required to spend if they were operating their own already-constructed pole systems. See J.A. 93, 200, 274. In addition, the rates are below the amounts Florida Power regularly charges to telephone companies that place attachments on its poles. In those circumstances, the Commission's imposition of a rate less than one-third the lowest rate negotiated by the parties can hardly be said to be necessary to "effectuation of a substantial public purpose."

II. Congress Has Failed To Provide For A Constitutionally Adequate Determination Of Just Compensation For The Taking Of Property Pursuant To The Authority Of The Pole Attachments Act.

The fifth amendment to the Constitution requires the payment of just compensation to an owner whose property has been taken for public use. Because the Commission's order pursuant to the Pole Attachments Act effected a taking of Florida Power's property, it is necessary to consider whether the statutory scheme permits just compensation within the meaning of the fifth amendment. See, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S. Ct. at 2566.

The court of appeals examined the just compensation issue from a broad perspective and concluded that the Pole Attachments Act on its face did not permit a constitutionally adequate determination of just compensation. Congress provided in the Act for some payment by cable companies to pole owners as compensation for the physical intrusion of the cable equipment. However, it did not provide that those payments should be measured according to the constitutional just compensation standard. Instead, Congress required the Commission to set rental rates within a narrow range defined by Congress in the statute, in terms of costs incurred by the pole owner. The court of appeals concluded that the approach mandated by Congress did not satisfy the constitutional requirements for the determination of just compensation, as defined by this Court.[26]

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[26] Appellants read the court of appeals' opinion too broadly when they characterize it as holding the Pole Attachments Act unconstitutional on the ground that an administrative agency may never make an assessment of facts relevant to the determination of just compensation. The statements in the court's opinion should be read in the context of the unique provisions of the Pole Attachments Act, which strictly confine the determination of compensation in Commission proceedings. See J.S. App. 19a.

Examination of the pole attachments scheme confirms the court of appeals' conclusion that that scheme fails to pass constitutional muster. Because the constitutional infirmities are inherent in the statutory scheme, the court of appeals acted properly in ruling that the provisions of the Pole Attachments Act must be struck down.

A. Congress' Prescription of a Binding Formula for Determination of Pole Attachment Rental Rates Precludes a Constitutionally Adequate Determination of Just Compensation.

In a long line of cases, this Court has defined the term "just compensation" as it is used in the fifth amendment. The goal of the just compensation requirement is to put the owner of property " 'in as good a position pecuniarily as if his property had not been taken.' " *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson* v. *United States*, 292 U.S. 246, 255 (1934)). Generally, just compensation means the fair market value of the property on the date it is appropriated. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 10 (1984); *United States* v. *564.54 Acres of Land*, 441 U.S. at 511; *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123, 130 (1950).

Under the fair market value standard, the owner of property is entitled to receive what a willing buyer would pay to a willing seller at the time of the taking. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. at 10; *United States* v. *564.54 Acres of Land*, 441 U.S. at 511; *United States* v. *Miller*, 317 U.S. 369, 374 (1943).[27] Measures of just compensation other than fair market value are used only when market value is too difficult to find or when its use would result in "manifest injustice." *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. at 10

[27] This measure of compensation applies equally to property owned by utilities. See *United States* v. *Virginia Elec. & Power Co.*, *supra*, 365 U.S. at 631-33.

n.14; *United States* v. *564.54 Acres of Land*, 441 U.S. at 512-13; *United States* v. *Commodities Trading Corp.*, 339 U.S. at 123.

This Court has also held that the determination of whether an owner whose property has been taken has received just compensation is ultimately a judicial function. Congress may not preempt that judicial function by prescribing a binding rule designed to restrict or prevent a court from determining constitutionally adequate compensation. The Court articulated this well-established doctrine in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893). In that case Congress had authorized the Secretary of War to purchase a lock and dam from the navigation company at a price not to exceed $161,733.13 and had stated expressly that the company's franchise to collect tolls was not to be considered in estimating the sum to be paid. The Court rejected these congressional limitations, concluding that an award of just compensation must include payment for the franchise to take tolls as well as for the value of the tangible property. In the course of its opinion, the Court stated:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes--that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327.

The Court has repeated this basic proposition on a number of occasions. In *Baltimore & Ohio Railroad* v. *United States*, 298 U.S. 349, 368-69 (1936), the Court stated:

> The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it. (Footnote omitted.)

See also, *e.g.*, *United States* v. *Commodities Trading Corp.*, 339 U.S. at 124 n.3; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51-52 (1936); *United States* v. *New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *Chicago, Milwaukee & St. Paul Railway* v. *Minnesota*, 134 U.S. 418, 458 (1890); *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378, 381, 129 Ct. Cl. 365, 371 (1954), *cert. denied*, 350 U.S. 863 (1955).

The Pole Attachments Act does not fix in dollars and cents a single maximum rental rate that can be charged by pole owners for attachment of cable equipment. However, the Act does set out a binding formula that the Commission is obliged to follow in determining rental rates, which does prescribe a maximum rate. That formula makes no reference to the fair market value of utility pole space; nor does it speak in terms of a transaction between a willing buyer and a willing seller. Rather, it requires the Commission to prescribe rental rates that fall within a narrow range between two cost-based measures. The Act states that compensation to the pole owner shall be:

> not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1).

The cost-based measure of compensation prescribed by Congress is obviously not equivalent to the constitutional measure of just compensation as defined by this Court. A rental rate based on cost is not the same as a rate based on fair market value reflecting the figure at which a willing buyer of pole space would rent from a willing seller. As a simple illustration, a congressionally-mandated rule that limited recovery for governmental taking of a residence to the homeowner's cost would surely not satisfy the fair market value standard and would be subject to constitutional challenge.[28]

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[28] The government argues (Gov't Br., pp. 20-22) that the upper limit of the measure set by Congress, *i.e.*, "fully allocated costs," is equivalent to just compensation within the meaning of the fifth amendment, citing *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985). The court in *Alabama Power* was not asked to decide whether the measure of compensation under the Pole Attachments Act satisfied constitutional standards. *Id.* at 365.

The discrepancy between the cost-based measure prescribed by the Pole Attachments Act and the fair market value standard is well illustrated by the facts of this case. The annual rental rates negotiated by Florida Power and the cable companies prior to the Commission's intervention ranged from $5.50 per pole to $7.15 per pole. Annual rental rates negotiated by Florida Power and the telephone companies that attach their wires to Florida Power's poles are approximately $9 per pole. And the United States Court of Appeals for the Sixth Circuit affirmed a trial court's express finding that an annual cable attachment rate of $5.60 per pole was reasonable. *Continental Cablevision* v. *American Electric Power Co.*, 715 F.2d 1115, 1121 (1983).[29] By contrast, the Commission's application of the congressionally-mandated cost-based standard yielded an annual rental rate of $1.79 per pole—less than one-third of the lowest amount negotiated by the parties.[30]

The binding formula set out in the Pole Attachments Act explicitly constrains the Commission in its decision-

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[29] In *Continental Cablevision*, cable companies contended that a rate of $5.60, instituted in 1975, was "unreasonable." Although the district court had deemed the rate of $5.60 reasonable in granting the defendant utilities' counterclaim for unpaid rents, the cable companies on appeal put forward the charge of "unreasonableness" in support of an unsuccessful claim of antitrust violations. The court of appeals affirmed the district court's finding that the rate was reasonable. 715 F.2d at 1121.

[30] Appellants imply (*e.g.* Gov't Br., p. 22 n.28) that fair market value may be an inappropriate measure of just compensation in pole attachments cases because the rental rates negotiated by utilities and cable companies allegedly were unreasonably high as a result of the superior bargaining position of pole owners. There has been no showing that the rates negotiated by Florida Power and the cable companies were in any way unfair or unreasonable. Those rates compare favorably with the annual rental rates of $9 per pole charged to telephone companies that string their wires on Florida Power's poles. Moreover, the rates charged by Florida Power were far lower than the annual cost of $17 to $20 per pole that a cable company would incur if it owned an already-constructed pole system. See J.A. 93, 200, 274.

making in connection with complaints filed under the Act. The statutory formula precludes the Commission from considering factors that are clearly relevant to a determination of just compensation within the meaning of the fifth amendment. The statute provides no mechanism for an independent judicial determination of a rental rate that would yield just compensation. Because Congress in enacting the formula has effectively appropriated for itself the determination of compensation to be paid to pole owners whose property has been taken through attachment of cable equipment, the Act is unconstitutional.

B. Appellate Review of Commission Orders Pursuant to the Pole Attachments Act Cannot Satisfy the Constitutional Requirements for Determination of Just Compensation.

Appellants concede that determination of just compensation is ultimately a judicial function. They contend, however, that the Constitution is satisfied so long as there is some judicial review of an agency's compensation determination. According to appellants, review of Commission orders pursuant to 47 U.S.C. § 402(a) and 5 U.S.C. § 706 affords an adequate opportunity for judicial determination of just compensation in pole attachments cases.

We submit that judicial review of Commission orders pursuant to the Pole Attachments Act is not sufficient to render the Act constitutional. We note as a preliminary matter that none of the cases cited by appellants holds expressly that judicial review of an award of compensation on an administrative agency record is sufficient to meet the constitutional requirements for determination of just compensation.[31]

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[31] The holding in *Bauman* v. *Ross*, 167 U.S. 548 (1897) resolved a seventh amendment issue. The Court's reference in *Bauman* to an estimate of just compensation by any but court-appointed and court-supervised commissioners, 167 U.S. at 593, appears to constitute dicta. In *United States* v. *Jones*, 109 U.S. 513, 517 (1883) a trial de novo on

Even if it is assumed that judicial review of agency findings with respect to compensation might be sufficient in some circumstances to satisfy the requirement of a judicial determination of just compensation, it is nevertheless inadequate in the case of the Pole Attachments Act. Judicial review arguably might be sufficient in the case of a statutory scheme under which the administrative agency had the flexibility to accept evidence of fair market value and to make a determination based on constitutional principles of just compensation. For example, a statute that merely instructed the agency to establish a "reasonable" or "just" rental rate would allow the agency to fix compensation at a level that would satisfy constitutional requirements. Under such a statutory scheme the reviewing court would have access to an administrative record sufficient to permit a determination of whether the agency had arrived at a constitutionally adequate amount.

The situation is very different under the Pole Attachments Act. Congress has not given the Commission the flexibility that would allow it to identify the constitutional amount of just compensation.[32] Instead, it has instructed

the issue of compensation was available. In *United States* v. *Commodities Trading Corp.*, *supra*, the Court addressed the adequacy of a compensation award, but not the constitutionality of the procedure for determining compensation. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court recognized the availability of a Tucker Act remedy against the United States—a proceeding that presents an opportunity for *de novo* judicial determination of just compensation. See *infra* n.32.

[32] On several occasions this Court has suggested that the availability of a remedy against the United States under the Tucker Act, 28 U.S.C. § 1491, would obviate constitutional objections to a statute that on its face failed to provide for a judicial determination of just compensation. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-20 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36, 148-49 (1974). This point is not pursued in detail by the government, and quite rightly because the Tucker Act could not save the Pole Attachments Act scheme. There is no indication that Congress intended that the federal government subsidize the cable television industry, which is the

the Commission to calculate a rate that must fall between two measures of the pole owner's costs. In practice, the record created at the agency level consists only of information relating to the narrow range of costs the Commission regards as relevant to its calculation of "fully allocated costs." See 47 C.F.R. § 1.1404(g) (1985). The Commission relies on affidavits of the parties providing proposed cost calculations, the contracts between the parties, and information on file with the Federal Energy Regulatory Commission. The court of appeals has this limited record before it when it reviews a pole attachments order. It does not have access to evidence of the fair market value of pole space, such as contract rates established in arms-length negotiations between electric utility companies and telephone companies and testimony by economic experts. The reviewing court therefore lacks a factual basis for determining whether the rental rate set by the Com-

beneficiary of reduced pole attachment rentals, at the expense of federal taxpayers. Indeed, the indication is to the contrary—that Congress intended to withdraw the Tucker Act remedy. The Pole Attachments Act expresses an unequivocal intent to limit utilities' compensation to the maximum amount the formula in § 224 allows. As is discussed more fully, *supra*, pp. 31-37, this limitation is inconsistent with an award of compensation under the fifth amendment. By contrast, in *Monsanto*, there was no statutory restriction relating to the determination of the proper compensation; thus the statute in no way imposed a limitation on the award that would conflict with a determination under the Tucker Act.

Moreover, in view of the large number of pole attachments contracts (see S. Rep. No. 95-580, *supra*, p. 12, estimating that there were 7800 such agreements in effect as of 1977), the potential for Tucker Act suits would be quite substantial. Inferring a Tucker Act remedy in order to preserve the Pole Attachments Act would lead to a system under which on repeated occasions there would be judicial review of the Commission order in the court of appeals and, subsequently, a Tucker Act proceeding in the Claims Court to consider the just compensation issue, again followed by judicial review. This Court recently rejected the suggestion that Congress in another context intended such a wasteful result. See *Lindahl* v. *Office of Personnel Management*, 105 S. Ct. 1620, 1637 (1985).

mission satisfies constitutional standards for just compensation. In these circumstances, the court of appeals properly concluded that the Pole Attachments Act is constitutionally defective in such fundamental respects that it must be struck down.[33]

The court of appeals' holding by no means disables Congress in its efforts to address any perceived problems in the pole attachments area. If this Court were to affirm the decision below, and if Congress were to continue to regard adjustment of negotiated contract rates as worthwhile, it could easily correct the statutory scheme by, *e.g.*, affording a broad mandate to the Commission to determine just compensation in the first instance and providing for *de novo* judicial determination of the compensation due to

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[33] The only other conceivable alternatives would have been for the court of appeals, faced with an agency record relevant to the statutory cost-based formula, to have (1) examined the record to see whether it contained additional evidence that would allow the court to decide the just compensation issue; (2) requested that the parties supplement the record in the court of appeals with evidence that would permit the court, acting as a trier of fact, to make the necessary judicial determination of compensation; or (3) remanded to the Commission for supplementation of the record beyond the scope of the statutory mandate. Any of these approaches would fly in the face of the express language of the statute and its congressionally prescribed formula. Moreover, none of these approaches comports with the respective roles of administrative agencies and reviewing courts.

In its brief (at p. 28), the government cites *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 320 (1953), in support of the proposition that a reviewing court may cure inadequacies in the record by permitting introduction of new evidence at the appellate level. The Court's reference in *American Trucking Ass'ns* was not to a court of appeals reviewing the decision of an agency on the administrative record, but to the federal district court from which the plaintiffs had sought injunctive relief under certain provisions of the Interstate Commerce Act. Unlike a district court, a court of appeals is not equipped to conduct evidentiary hearings or to make independent findings of fact.

pole owners. However, the present statutory scheme is clearly defective and cannot survive.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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